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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

[FNS-2011-0025]

RIN 0584-AE15

Certification of Compliance with Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010

AGENCY: Food and Nutrition Service, USDA

ACTION: Interim final rule.

SUMMARY: This interim rule amends National School Lunch Program regulations to conform to requirements contained in the Healthy, Hunger-Free Kids Act of 2010 regarding performance-based cash assistance for school food authorities certified compliant with meal pattern and nutrition standards. This rule requires State agencies to certify participating school food authorities (SFAs) that are in compliance with meal pattern and nutrition standard requirements as eligible to receive performance-based cash assistance for each reimbursable lunch served (an additional six cents per lunch available beginning October 1, 2012 and adjusted annually thereafter). This rule also requires State agencies to disburse performance-based cash assistance to certified SFAs, and withhold the performance-based cash assistance if the SFA is determined to be out of compliance with meal pattern or nutrition standards during a subsequent

administrative review. The intended effect of this rule is to provide additional funding for SFAs to implement new meal pattern requirements, thus increasing the healthfulness of meals served to school children.

DATES: Effective date: This interim rule is effective July 1, 2012.

Comment dates: Comments on rule provisions: Mailed comments on the provisions in this rule must be postmarked on or before (insert date 90 days after publication in the Federal Register); e-mailed or faxed comments must be submitted by 11:59 p.m. on (insert date 90 days after publication in the Federal Register); and hand-delivered comments must be received by 5 p.m. (insert date 90 days after publication in the Federal Register) to be assured of consideration.

Comments on Paperwork Reduction Act requirements: Comments on the information collection requirements associated with this rule must be received by (insert date 60 days after publication in the Federal Register).

ADDRESSES: The Food and Nutrition Service (FNS) invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, FNS, Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594.
- Hand Delivery or Courier: Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.-5:00 p.m.

All submissions received in response to this interim rule will be included in the record and will be available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting comments will be subject to public disclosure. FNS will also make the comments publicly available by posting a copy of all comments on <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, FNS, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 305-2590.

SUPPLEMENTARY INFORMATION:

I. Background

The National School Lunch Program (NSLP) provides cash assistance to States to assist schools in providing nutritious lunches for school children. In order to receive reimbursement, schools must serve lunches that meet program requirements, including statutory and regulatory nutrition standards.

Prior to the enactment of the Healthy, Hunger-Free Kids Act of 2010(P.L. 111-296), on December 13, 2010, the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1751 et al.) authorized only general and special cash assistance for lunches served in the NSLP. Section 4 of the NSLA authorizes the Secretary to provide two levels of general cash assistance for all lunches served, including lunches to children whose family income is above 185 percent of the Federal poverty guidelines. The lower cash assistance level applies to lunches served by

SFAs in which less than 60 percent of the lunches served in the school lunch program during the second preceding school year were served free or at a reduced price. The higher payment level applies to lunches served by SFAs in which 60 percent or more of the lunches served during the second preceding school year were served free or at a reduced price.

To supplement the general cash assistance payments, section 11 of the NSLA (42 U.S.C. 1759a) authorizes the Secretary to provide special cash assistance payments to schools providing free and reduced price meals. Children from families with income at or below 130 percent of the Federal poverty level are eligible for free meals, while those from families with incomes between 130 and 185 percent are eligible for reduced price meals. As a result, lunches served to those students are reimbursable at a higher, special assistance rate.

In accordance with section 11 of the NSLA, both the general and special cash assistance reimbursement rates are adjusted annually on July 1 of each year. Annual adjustments reflect changes in the cost of operating the NSLP, as indicated by the change in the Food Away From Home series of the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. Each year, the Department of Agriculture (the Department) publishes a Notice specifying the annual adjustments.

The Healthy, Hunger-Free Kids Act of 2010

The Healthy, Hunger-Free Kids Act of 2010 (the HHFKA) made significant changes to the NSLA. Section 201 of the HHFKA amended section 4(b) of the NSLA, 42 USC 1753(b), by requiring the Secretary to update the meal patterns and nutrition standards for the NSLP and School Breakfast Program (SBP) and to issue regulations requiring all SFAs to comply with the updated meal patterns and nutrition standards.

On January 13, 2011, the Department published a proposed rule, Nutrition Standards in the National School Lunch and School Breakfast Programs (76 FR 2494), which proposed to update the meal patterns and nutrition requirements for the NSLP and SBP, as required by the NSLA. The Department received over 132,000 comments from the public on the proposed rule. Subsequently, on January 26, 2012, the Department issued a final rule, also entitled Nutrition Standards in the National School Lunch and School Breakfast Programs, (77 FR 4088) (hereafter referred to in this preamble as “the updated meal pattern rule”). The implementation date of the final rule is July 1, 2012.

Section 201 of the HHFKA also amended the NSLA to provide for additional assistance payments in the form of performance-based reimbursement of 6 cents per lunch served beginning on October 1, 2012. Performance-based cash reimbursement is in addition to the general and special cash assistance described above and is to be provided for each lunch served in SFAs certified by the State agency to be in compliance with the updated meal patterns and nutrition standards (hereafter referred to in this preamble as “updated meal patterns”).

In recognition of the significance of changes necessitated by the new statutory requirements, section 201 of the HHFKA also amended section 4(b) of the NSLA to provide \$50 million for each of two years to assist in the implementation of the updated meal patterns. During each of those two years, \$47 million of the \$50 million will be made available to State agencies for training, technical assistance, certification, and oversight activities. The remaining \$3 million will be used to support Federal implementation of the new requirements. This is in addition to the annual allocation of State administrative expense funds made available to State agencies in accordance with section 7 of the Child Nutrition Act of 1966, 42 U.S.C. 1776, and 7 CFR Part 235.

Performance-Based Reimbursement

As noted above, Section 201 authorized the provision of performance-based cash assistance (performance-based reimbursement) for each lunch served in SFAs certified to be in compliance with the updated meal patterns. Specifically, section 201 added subparagraphs (D) and (E) to section 4(b)(3) of the NSLA which read as follows:

- **ELIGIBLE SCHOOL FOOD AUTHORITY.**—To be eligible to receive an additional reimbursement described in this paragraph, a school food authority shall be certified by the State to be in compliance with the interim or final regulations described in subparagraph (A)(ii).
- **FAILURE TO COMPLY.**—Beginning on the later of the date described in subparagraph (A)(ii)(II), the date of enactment of this paragraph, or October 1, 2012, school food authorities found to be out of compliance with the meal patterns or nutrition standards established by the implementing regulations shall not receive the additional reimbursement for each lunch served described in this paragraph.

Congress clearly intended that each SFA recognized as complying with updated meal patterns should be certified and should receive performance-based reimbursement for each eligible meal served. However, the method for assessing such compliance and determining such eligibility for performance-based reimbursement was not clearly enunciated in the above-cited provisions. Further, in subparagraph (E), it is not clear whether the reference to “meal patterns or nutrition standards established by the implementing regulations” refers to both the SBP and the NSLP or just the NSLP, especially considering that the provision reinforces the concept that the performance reimbursement is only applied to lunches served. As a result, it was necessary for the Secretary to develop an interpretation of this provision in order to determine how to implement it in this interim rule. Key to that determination was establishing the extent to which failure to comply with the updated meal patterns in SBP would jeopardize a SFA’s ability to

continue to receive the performance-based reimbursement. First, the Department considered the overall purposes of the HHFKA, as Congress articulated them in the legislative history:

In summary, it is evident that tremendous needs exist to reduce childhood hunger and food insecurity, as well as to improve the diets and overall health of American children more generally. The purpose of this bill is to address those needs in order that fewer low-income children have to go without food, and to ensure that more children from all income levels adopt the kind of healthful eating habits and lifestyles that will enable them to live longer, more productive lives. (Senate Report 111-178, page 5.)

It was apparent that in considering the HHFKA, Congress noted that participation in the SBP was substantially lower than participation in the NSLP and that the need for both of these programs is growing as a large segment of America's school aged children face food insecurity.¹ Congress also explicitly discussed the need to raise nutrition standards for both SBP and NSLP, noting in pertinent part that "considerable work remains to be done to improve children's diets and to bring Federally-subsidized meals in line with USDA nutritional guidelines."² The HHFKA performance-based reimbursement provisions were intended to facilitate the raising of nutritional standards in these programs.

After consideration of expressed Congressional intent and given the dual focus of the HHFKA on raising nutritional standards and improving program access in order to address food

¹Senate Report 111-178, page 2.

²The legislative history of the HHFKA contains the following:

In addition to their importance in addressing food insecurity, Federal child nutrition programs play a critical role in providing nutritious, balanced meals to children and promoting healthy life- styles. Major strides have been made in recent years to improve the quality of meals served to children through child nutrition programs. According to the third USDA School Nutrition Dietary Assessment (SNDA III), in school year 2004–2005, over 95 percent of NSLP lunches offered and served by most schools met USDA goals for cholesterol over a typical week and were lower in saturated fat than meals served in school year 1998–1999, when the last SNDA was conducted. Larger proportions of elementary schools met the standards for total fat and saturated fat, and a larger proportion of secondary schools met the standard for saturated fat.

Despite this significant progress, however, considerable work remains to be done to improve children's diets and to bring Federally-subsidized meals in line with USDA nutritional guidelines. According to USDA, roughly 99 percent of lunches included amounts of sodium above the recommended levels. And, only 26 percent and 34 percent of schools served lunches that met USDA guidelines for total fat and saturated fat, respectively. Additionally, available research has consistently shown that the diets of U.S. children do not meet current national dietary recommendations for nutrition and health. Overall, children today have diets that are low in fruits, vegetables, whole grains, and dairy foods, and high in sodium, fat and added sugars. The 2005 Dietary Guidelines recommend that Americans consume half of their grains as whole grains, but according to the U.S. Department of Health and Human Services report, *Healthy People 2010*, only 7 percent of children ages two to 19 years currently meet this recommendation. (Senate Report 111-178, page 4.)

insecurity, the Department adopted a balanced approach in implementing the performance-based reimbursement provisions in this interim rule. The Department is of the view that the burden on SFAs should not be too onerous in scope nor too rapid in implementation insofar as either result could lead SFAs to decide not to make the changes necessary to receive the performance-based reimbursement or to cease SBP participation and focus solely on raising the nutritional standards for lunches served in the NSLP. On the other hand, the Department is committed to implementing the provisions in a way that is robust enough to ensure that SFAs receiving the performance-based reimbursement have implemented improved nutritional standards. The approach taken in this interim rule, then, is to strike the appropriate implementation balance to achieve both the goal of expanding participation and of raising nutritional standards of the school meals served to America's children.

Thus, in formulating regulations to implement the performance-based reimbursement, the Department sought to further the overall goals of the HHSFKA as expressed by Congress and the ultimate purposes of the performance-based reimbursement. Specifically, the Department views section 4(b)(3)(D) and (E) as establishing two separate requirements. Subparagraph (D) requires that at the time an SFA is certified by the State agency to receive the 6 cents per lunch performance-based reimbursement, the State agency must determine that the SFA is in compliance with the updated meal patterns and nutrition requirements in effect at the time of certification for the NSLP (and for the SBP if the SFA participates in that program). That is, for an SFA to be eligible for the performance-based reimbursement, it must meet the improved nutritional standards then in effect for the lunches and breakfasts it serves under these programs. The Department believes that this approach to the certification requirement of subparagraph (D)

meets the overall goals of the HHFKA, comports with the expectations of Congress, and incentivizes SFA's to raise the nutritional standards for all meals served.

In subparagraph (E), the HHFKA provides that an SFA which falls out of compliance with the meal patterns or nutritional requirements is precluded from receiving the 6 cents per lunch performance-based reimbursement. In considering the implementation of this provision, the Department focused on the statutory intent of the phrase "school food authorities found to be out of compliance with the meal patterns or nutrition standard." As discussed above, in examining this phrase, the Department determined that it is unclear whether "meal patterns or nutrition standards" encompasses the patterns and standards in both the SBP and the NSLP or refers solely to those of the NSLP. The determination is especially important given that the 6 cents performance-based reimbursement may only be provided to an SFA for the service of eligible lunches. There is no legislative history that provides additional insight or explanation as to the intent of Congress regarding the interpretation of this key phrase in the provision. Thus, after analysis and in consideration of the other changes to the NSLP and SBP accomplished in accordance with section 201 of the HHFKA, the Department shaped its interpretation of this phrase in light of the overall intent of the HHFKA and in keeping with federal experience in administering these programs.

State agencies currently conduct regular administrative reviews of participating SFAs for both the NSLP and the SBP. In instances in which a State agency finds that the SFA has violated one of more critical areas of review, program regulations require that the SFA implement corrective action. The State agency may withhold program payments during the corrective action period, but will also provide technical and other assistance to the SFA and confirm corrective action through one or more follow up reviews. Pursuant to program regulations and

consistent with the general policy of the Department, only in the rare instance in which an SFA fails to complete corrective action in a critical area of review does a State agency disallow meal reimbursements. The regulatory framework reflects the reality that a reduction in program payments of any amount is most likely to have an adverse impact on those who these programs are designed to help, the children receiving these school meals.

Accordingly, in interpreting subparagraph (E) for the purposes of developing the implementing regulations in the interim rule, the Department has taken the following factors into account:

1) As explained above, it is clear that the 6 cents performance-based reimbursement and the compliance requirements of subparagraph (E) have a dual intent — to expand SFA participation in the NSLP and SBP and to encourage SFAs to raise nutritional standards for both the NSLP and SBP. In implementing the statute, the Department must balance the need effectively to encourage compliance with the increased nutritional standards for both programs without imposing unnecessary burdens likely to discourage SFAs from raising their breakfast and lunch nutrition standards or from participating in SBP. Neither of these outcomes would be compatible with the purposes of the HHFKA.

2) The implementation of the meal patterns and nutrition standards developed pursuant to the HHFKA will be phased in over a period of several years with SBP implementation likely to be more dynamic over the course of the next several years.

Taking into account all of these factors and balancing the overall goals of the HHFKA-mandated performance-based reimbursement, the Department concluded that for the purposes of the interim rule, Congress' use of the phrase “the meal patterns or nutrition standards” in subparagraph (E) of the HHFKA means the meal patterns or nutrition standards of the NSLP but

not the SBP. As a result, this interim rule provides that if the SFA is certified to receive the performance-based reimbursement and, during a State agency's administrative review, is found to be in violation of a review area of the updated meal patterns for the SBP established in program regulations, the SFA is not in jeopardy of losing the performance-based reimbursement for eligible lunches served under the NSLP. Conversely, if the SFA is found to be out of compliance with the updated meal patterns for the NSLP, the SFA is at risk of losing the performance-based reimbursement. In addition, if the State agency finds a SFA out of compliance with the updated meal patterns for either SBP or the NSLP, the State agency is required to follow the standard operating procedures for administrative reviews. This means that a SFA could be subject to fiscal sanctions if the State agency determines that the SFA has not completed timely the corrective action as required by the regulations.

The Department has determined that this approach strikes the right balance regarding the implementation of the requirements the HHFKA added to NSLP in sections 4(b)(3)(D) and (E) and reflects the intent of Congress as clarified in pertinent legislative history regarding the goals of the HHFKA. Consistent with the HHFKA provisions, the interim rule clearly requires SFAs that participate in the SBP and the NSLP to meet the higher nutritional standards in effect for both programs at the time the SFAs are certified. Existing regulations continue to require State agencies to establish corrective action plans and work with SFAs to timely complete corrective actions for any violations identified during administrative reviews relating to either program. On balance, the implementation of performance-based reimbursement and the higher nutrition standards will allow the performance-based reimbursement and compliance tools to serve as an effective incentive for SFAs to increase participation in these programs while raising nutritional standards.

II. Overview

This interim rule amends 7 CFR part 210, the regulations governing the NSLP, to add the procedures for performance-based certifications, required documentation and timeframes, validation reviews, compliance and administrative reviews, reporting and recordkeeping, and technical assistance.

Performance-based Certification Requirements

In accordance with the HHFKA, State agencies must provide performance-based reimbursements for each lunch served in eligible SFAs, i.e., SFAs certified by the State agency to be in compliance with the updated meal patterns for the NSLP (as well as for the SBP, if the SFA participates in the SBP). Section 210.7(d) has been revised to set forth the procedures for performance-based certifications for both State agencies and SFAs.

(1) State agency certification responsibilities

Section 210.7(d)(1) of this interim rule requires State agencies to establish procedures to certify SFAs for performance-based cash reimbursement in accordance with guidance established by the Food and Nutrition Service (FNS). State agencies must provide guidance to facilitate the certification process, including making SFAs aware of certification protocol and documentation required to demonstrate compliance with updated meal patterns set forth in §210.10 and for those SFAs participating in the SBP, 7 CFR 220.8 or 220.23. Compliance with both NSLP and SBP updated meal patterns is necessary to be certified for performance-based cash reimbursements for lunch. However, because some aspects of the updated meal patterns are

phased in over several years, SFAs must demonstrate compliance with requirements in effect at the time of certification.

In school years subsequent to the school year of certification, through School Year 2014-2015, State agencies must require SFAs to submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in. The phase in timeline for meal pattern requirements is established in the updated meal pattern rule. FNS will provide SFAs with a prototype attestation which includes a statement attesting compliance with each of the phased in meal pattern requirements. The attestation must be provided to the State agency as an addendum to the written agreement required in §210.9(b). Additionally, this interim rule requires in new §210.18(g) that compliance with new requirements in subsequent years will be confirmed during State administrative reviews.

This interim regulation also requires that State agencies' procedures must also include a protocol for timely review of certification documents and disbursement of funds to eligible SFAs. Once a SFA is certified, a State agency must promptly disburse performance-based reimbursement to the SFA beginning with the start of certification. State agencies must begin making performance-based reimbursement payments for lunches served in certified SFAs in the calendar month for which the SFA is certified. However, because performance-based cash reimbursement is not available until October 1, 2012, State agency procedures must ensure that no performance-based reimbursement is provided for meals served by SFAs prior to October 1, 2012.

Finally, during School Year 2012-2013, State agencies must conduct on-site validation reviews for a sample of certified SFAs to ensure that submitted certification documentation accurately reflects the meal service.

These requirements are discussed in more detail below.

(2) SFA Responsibilities

Section 210.7(d)(2) of this interim rule establishes requirements for SFAs seeking to obtain performance-based reimbursement. SFAs must submit certification materials to the State agency in accordance with State agency certification procedures, including documentation to support receipt of performance-based reimbursement. SFAs must attest that the documentation provided is representative of the ongoing meal service within the SFA. Required documentation is described below. SFAs certified to earn performance-based reimbursement must maintain documentation of compliance, including production and menu records, and other records, and SFAs must make appropriate records available to State agencies upon request.

Required Documentation and Timeframes

SFAs may demonstrate compliance with the updated meal patterns to the State agency in a variety of ways, briefly described below. FNS developed the following options for certification using, to the maximum extent possible, existing processes and information available to the State agency and SFAs. This flexible approach is intended to facilitate the timely completion of certification activities with a reasonable burden on State agencies and SFAs. Additionally, the approach ensures that an SFA's compliance with the updated meal patterns is assessed accurately.

Option 1: Menus and nutrient analysis. Approximately two-thirds of SFAs currently plan menus using nutrient analysis software. Although SFAs will no longer be required to conduct a nutrient analysis once updated nutrition standards are in effect, those using software to plan

menus may use the software's nutrient analysis function to document compliance with updated meal patterns. SFAs that select this option must submit to the State agency one week of each type of menu offered in the schools under its jurisdiction, nutrient analyses of the submitted menus, and a detailed menu worksheet which shows food items and quantities (as specified by FNS) which will be used to assess compliance with updated meal patterns.

Option 2: Menus and a simplified nutrient assessment. In lieu of showing compliance with updated meal patterns via a full menu nutrient analysis, SFAs may perform a simplified nutrient assessment related to foods offered on school menus to demonstrate to the State agency compliance with updated meal patterns. SFAs that exercise this certification option must submit to the State agency, a simplified nutrient assessment (as specified by FNS), one week of each type of menu offered, and a detailed menu worksheet with food items and quantities (as specified by FNS).

Option 3: State agency review findings. An SFA may also demonstrate compliance with updated meal patterns during the course of a regular State agency-conducted administrative review, if the State offers this option. A detailed menu worksheet with food items and quantities (as specified by FNS) is required as part of the materials used to demonstrate compliance. When conducting an administrative review, a State agency may certify an SFA to receive performance-based reimbursement if the State agency can confirm compliance with all meal pattern and nutrition standards. The State agency may document certification in lieu of asking the SFA to submit documentation.

SFAs may choose whether to submit menus with a nutrient analysis (option 1), or with the simplified nutrient assessment (option 2). The option to certify SFA compliance during the

course of an administrative review is left to the State agency. State agencies that wish to use this approach for some or all of their SFAs should notify these SFAs promptly.

To ensure that certification documentation accurately reflect current SFA practices, menus submitted for certification after October 1, 2012 must be submitted for certification at or around the time of planned usage. To facilitate disbursement of performance-based reimbursement as soon as it becomes available (October 1, 2012), State agencies should begin preparing for certification activities upon publication of this interim rule, so that the certification process for SFAs may begin as soon as possible following the beginning of SY 2012-2013. SFA-submitted certification materials submitted prior to October 1, 2012 should include menus that will be served October 1, 2012 or later. If a SFA submits certification materials to the State agency and is found to be out of compliance, the State agency may not authorize the performance-based reimbursement, must provide technical assistance in non-compliant areas, and encourage the SFA to take corrective action and reapply for certification. The SFA may reapply for certification as soon as corrective action is taken. If, in reviewing performance-based certification materials, the State agency finds a significant noncompliance violation (e.g., a missing meal component), the State agency must require the SFA to undergo an administrative review early in the review cycle.

In years subsequent to the year certified, through School Year 2014-2015, SFA's will be required to submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in. The phase in timeline for meal pattern requirements is established in the updated meal pattern rule. The attestation must be provided to the State agency as an addendum to the written agreement required in §210.9(b).

State Agency Timeframes

Because of the short implementation timeline prior to performance-based reimbursement becoming available, FNS seeks to ensure that certification activities are conducted in a timely manner. This interim rule requires in the new §210.7(d)(1) that State agencies must review certification materials and make a certification determination within 60 days of receipt from the SFA or as otherwise authorized by FNS.

Upon certification, the State agency must reimburse the certified SFA with the additional performance-based reimbursement for each lunch served beginning in the start of the month in which the certified menus are served. For example, if menus for the first week of October are certified in December, the State agency must retroactively reimburse the additional performance-based reimbursement for all lunches served on or after October 1.

Documentation must reflect current meal service, i.e., meal service in the calendar month the certification materials are submitted or, in the month preceding the calendar month of submission. For the time period prior to the availability of funds (July 1, 2012 –September30, 2012), SFAs may submit documentation of compliance reflecting planned meal service beginning October 1, 2012. However, in no case can reimbursement be made for meals served prior to October 1, 2012.

Provision of the performance-based reimbursement is added by this interim rule at §210.7(d).

State Agency Validation Reviews

For School Year 2012-2013, State agencies also must conduct on-site validation reviews for a sample of certified SFAs to validate the information submitted for certification. This interim rule requires in §210.7(d)(1)(vi)(A) State agencies to conduct on-site validation reviews for a

random sample of 25 percent of certified SFAs, except that the sample must include all large certified SFAs, as defined in 210.18(b)(6). Because certifications will be ongoing throughout School Year 2012-2013, State agencies should select SFAs for validation reviews throughout the year to ensure that all certified SFAs are included in the sample universe. During on-site validation reviews, State agencies must observe a meal service for each type of certified menu, review the production records for observed meals to ensure they are consistent with the menus on which the certification determination was based, and review the documentation submitted for certification to ensure that ongoing meal service operations are consistent with certification documentation. These requirements are added by this rule at §210.7(d)(vi).

The Department is mindful of State agency concerns about increased administrative burden related to implementing new meal pattern requirements, training and technical assistance, increased review frequency, and performance-based reimbursement certifications and validation reviews. In response to these concerns, for School Year 2012-2013, §210.18(a) of this rule permit State agencies to conduct performance-based reimbursement certifications and validation reviews in lieu of administrative reviews, unless an SFA is determined by the State agency to be at-risk for improper payments. This flexibility for the 2012-2013 School Year is discussed later in this preamble.

FNS anticipates that SFAs in compliance with updated standards will seek certification by the State agency in a timely manner in order to receive performance-based reimbursement at the earliest possible date. An SFA that either does not voluntarily submit certification documentation or that submits materials that do not support certification will not receive the performance-based reimbursement. Further, §210.18(d)(3) and (e)(4) require State agencies to conduct an administrative review of a non-compliant school food authority earlier in the review

cycle. For these SFAs, compliance with the updated meal patterns will be evaluated at the next administrative review, at which time the State agency will assess compliance with the updated meal patterns and determine eligibility for the performance-based reimbursement. This provision is established by this rule in §210.18(e)(4). State agencies are strongly encouraged to include those SFAs not certified in School Year 2012-2013 in the first year of the administrative review cycle (which is School Year 2013-2014).

Ongoing Compliance and Subsequent Administrative Reviews

The updated meal pattern rule increases the scope of State agency administrative reviews of SFAs by eliminating School Meals Initiative (SMI) reviews and revising the Performance Standard 2 portion of the administrative review (commonly referred to as, Coordinated Review Effort) to reflect new meal pattern requirements. The final rule also increases review frequency to once every three years beginning School Year 2013-2014, requires that breakfasts be reviewed during administrative reviews, and establishes requirements for fiscal action related to specific meal pattern violations.

Administrative reviews will continue to assess both general and critical areas. The critical areas contain two performance standards: Performance Standard 1 assesses certification, counting, and claiming procedures to ensure that all free, reduced, and paid lunches are served to eligible children and that lunches are counted correctly to yield accurate claims; and Performance Standard 2 assesses whether lunches meet the updated meal patterns set forth in §210.10 and breakfast meets §220.8 or §220.23, as applicable. The rule also establishes requirements for when State agencies must take fiscal action for specific meal pattern violations.

After the initial certification to receive performance-based reimbursement, State agencies will assess continued compliance with the lunch and breakfast patterns at subsequent administrative reviews, as described above. If the SFA is certified to receive the performance-based reimbursement and, on an administrative review, is found to be non-compliant with the updated meal patterns for lunch established in §210.10, the State agency must follow the standard operating procedures set forth in §§210.18 and 210.19. As a result of this interim rule, these procedures include cessation of the performance-based reimbursement for noncompliance with lunch requirements until the SFA demonstrates to the satisfaction of the SA that corrective action has taken place. Absent immediate corrective action, the State agency must turn off the 6 cents per lunch reimbursement with the beginning of the month following the administrative review and, at State discretion, may turn off the 6 cent per lunch reimbursement for the month under review. As always, the State agency may recover any funds improperly paid back through the beginning of the certification period. Non-compliance with the breakfast requirements would be handled in the usual review procedure and would not be a basis for cessation of the performance-based reimbursement. As required by the updated meal pattern rule, breakfast requirements are now part of the administrative review process which means that violations of the breakfast requirements will now result in fiscal action until such time as corrective action occurs. This requirement is established by this interim rule in §210.18(m)(3) and §210.19(c)(2)(iv).

School Year 2012-2013 Monitoring Adjustments

The Department recognizes updating the school meal patterns and implementing the new performance-based reimbursement certification process will require a significant effort on the part of the State agencies, and local SFAs. To help ensure State agencies provide SFAs with the

training and technical assistance needed to implement the updated meal patterns and performance-based funding requirements, the Department has reduced the administrative review requirements for School Year 2012-2013, as indicated above.

The previously mentioned final rule, Nutrition Standards in the National School Lunch and School Breakfast Programs, eliminated the School Meal Initiative reviews (formerly required under §210.19), effective with the beginning of School Year 2012-2013.

This interim rule revises §210.18(a) to permit State agencies to conduct administrative Coordinated Review Effort reviews scheduled for School Year 2012-2013 in either School Year 2012-2013 or 2013-2014, with one exception: State agencies must conduct a scheduled School Year 2012-2013 review in that year of any school food authority at risk for improper payments, as determined by the State agency. State agencies are advised that any reviews moved to School Year 2013-2014 count toward, and are not in addition to, the required number of reviews for the first three-year administrative review cycle.

State agencies must continue to conduct additional administrative reviews (AARs) of selected local educational agencies that have a demonstrated level of, or are at high risk for, administrative error. On November 4, 2010, State agencies were provided guidance on the implementation of AARs in school year 2010-2011(Additional Administrative Reviews and State Retention, SP_07 – 2011 (Revised)). Because AARs target local educational agencies that have a demonstrated level of, or are at high risk for, administrative error, the Department has determined AARs are an essential review activity and this interim rule does not modify their use.

These changes are expected to provide State agencies with the flexibility needed to conduct necessary training, technical assistance, and certification activities while exercising proper stewardship of federal funds.

Reporting and Recordkeeping

To facilitate disbursement of performance-based reimbursement to State agencies and, ultimately, SFAs, this interim rule establishes performance-based reimbursement reporting requirements for State agencies and SFAs.

In addition to incorporating meal counts earning the performance based reimbursement on the Report of School Program Operations (FNS-10), State agencies must submit a quarterly report, as specified by FNS, detailing the disbursement of performance-based reimbursement, including the total number of SFAs in the State, the names and locations of certified SFAs, and, for each school food authority, the total number of lunches earning the performance-based reimbursement for each month. In addition, this rule requires SFAs to submit to the State agency documentation to demonstrate compliance and support the receipt of performance-based reimbursement and an annual attestation of compliance with the meal pattern as new requirements become effective. The new reporting requirements for SFAs and State agencies, respectively, are contained in §210.5(d)(2)(ii) and §210.15(b)(2).

Technical Assistance

FNS will work with State agencies to facilitate transition to the new meal requirements and assist SFAs in becoming eligible to receive performance-based reimbursement. FNS and the National Food Service Management Institute are developing technical assistance resources and training to help school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality. Resources and training materials being developed include identifying and purchasing whole grain-rich foods, lowering

sodium in menus, and understanding and meeting the new meal pattern requirements. Training will be available through a variety of methods including webinars and online learning modules.

In addition, Section 201 of the HHFKA amended Section 9(b)(3)(F) of the NSLA, by providing \$50 million for each of two years to help FNS and State agencies implement new requirements implemented by this interim rule, including training, technical assistance, and conducting performance-based certifications. As provided for in HHFKA, we expect that all but \$3 million of each year's funds (which will be used to support Federal implementation) will be made available to State agencies for those purposes. These funds, combined with subsequent increases in State Administrative Expense funding, aim to provide resources that State agencies may use to assist local program operators to improve the quality of school meals provided to children and come into compliance with the new meal patterns.

FNS is also developing guidance, resources, and necessary forms to assist with the timely execution of performance-based certifications, and will make these materials available on a centralized website. These materials will be available at:

http://www.fns.usda.gov/cnd/Governance/Legislation/CNR_resources.htm.

III. Procedural Matters

Issuance of an Interim Rule and Date of Effectiveness

The Department, under the provisions of the Administrative Procedure Act at 5 U.S.C. 553(b)(B), finds for good cause that use of prior notice and comment procedures for issuing this interim rule is impracticable. Section 201 of the Healthy, Hunger-Free Kids Act of 2010, P.L. 111-296, enacted on December 13, 2010, requires provision of the performance-based reimbursement to SFAs determined to be eligible beginning on October 1, 2012. Because the

provision of performance-based reimbursement is dependent on the publication and implementation of the final meal pattern requirements, the Department concludes that there is insufficient time to issue both a proposed rule and final rule prior to the statutory implementation deadline. As a result, this interim rule is necessary to comply with the requirements of Section 201 of P.L. 111-296 and ensure that those provisions are implemented and effected by State agencies and SFAs by October 1, 2012.

The Department invites public comment on this interim rule, and will consider amendments to the interim rule based on comments submitted during the 90-day comment period. The Department will address comments and affirm or amend the interim rule in a final rule.

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This interim rule has been designated an “economically significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this interim rule. The following is a summary of the RIA. The complete RIA is published in this docket (FNS-2011-0025) on www.regulations.gov.

Need for action

Section 201 of the Healthy Hunger-Free Kids Act of 2010 (HHFKA) provides for a 6 cent per lunch performance based reimbursement to SFAs that comply with NSLP and SBP meal standards that take effect on July 1, 2012. This rule provides the regulatory framework for establishing initial school food authority (SFA) compliance with the new meal standards and for monitoring ongoing compliance.

Benefits

This rule establishes procedures that will result in a transfer from the Federal government to SFAs of as much as \$1.4 billion through FY 2016 to implement improved NSLP and SBP meal patterns that are more fully aligned with the *Dietary Guidelines for Americans*. The 2010 Dietary Guidelines Advisory Committee emphasizes the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease. The new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally. Those goals of the meal patterns rule are furthered by the funding made available by this interim rule.

Costs

In addition to the estimated \$1.4 billion 5-year transfer from the Federal government to SFAs in NSLP meal reimbursements, SFAs will incur some minor costs to prepare materials to document and certify their compliance with the new meals patterns. State agencies will incur costs to review that documentation, make certification decisions, conduct on-site SFA verification

reviews, and provide technical assistance to the SFAs. Through FY 2016, these administrative functions are expected to cost \$3.7 million. Finally, the interim rule provides for an additional \$100 million over fiscal years 2012 and 2013 to fund technical assistance, oversight, monitoring, and certification activity by the States.

Accounting statement

The following accounting statement gives the estimated discounted, annualized costs and transfers of the rule. The figures are computed from nominal 5-year estimates developed in the full RIA. The accounting statement contains figures computed with 7 percent and 3 percent discount rates under two scenarios. The first scenario estimates the cost of full and immediate SFA compliance with the new meal patterns. Under that upper bound scenario, summarized in the preceding paragraphs, the nominal 5-year increase in NSLP reimbursements totals \$1.4 billion, and State and SFA administrative expenses equal \$3.7 million. The second scenario models full SFA compliance within 3 years. Under that alternate scenario, the nominal 5-year increase in NSLP reimbursements totals \$1.2 billion, and State and SFA administrative expenses are \$3.8 million.

The figures in the accounting statement rows labeled “costs” include State and SFA administrative expenses as well as the \$3 million retained by USDA in each of the fiscal years 2012 and 2013 out of the \$100 million provided by HHFKA for State technical assistance, certification, and monitoring activity.

The figures in the rows labeled “transfers” include Federal NSLP reimbursements to SFAs plus the \$47 million in Federal assistance (\$50 million less \$3 million retained for Federal expenses)

in each of the fiscal years 2012 and 2013 for State technical assistance, certification, and monitoring activity.

	Primary Estimate	Alternate Estimate	Year Dollar	Discount Rate	Period Covered
Benefits					
<u>Qualitative:</u> This rule encourages SFA compliance with the NSLP and SBP meal standards that take effect on July 1, 2012 by providing an additional 6 cent reimbursement for lunches served that meet the new requirements. The additional funds will help offset about 30 percent of the costs incurred by SFAs to serve meals that comply with the new requirements.					
Costs					
Annualized Monetized (\$millions/year)	\$2.2	\$2.2	2012	7%	FY2012-2016
	\$2.0	\$2.0	2012	3%	
Costs shown here are a combination of State, SFA, and Federal costs. State and SFA costs are the administrative costs associated with submitting and processing SFA documentation to support SFA claims of compliance with the meal standards rule. Federal costs are equal to the \$3 million retained by the USDA in each of the years FY 2012 and FY 2013 from the \$100 million made available by HHFKA for State agency technical assistance, certification, and monitoring activity.					
Transfers					
Annualized Monetized (\$millions/year)	\$288	\$260	2012	7%	FY2012-2016
	\$292	\$264	2012	3%	
There are two transfers included in these figures. The first is the \$47 million transfer from the Federal government to State agencies each of the years FY 2012 and FY 2013 to support State agency technical assistance, certification, and monitoring activity. The second is the transfer from the Federal government to SFAs for increased NSLP meal reimbursements.					

Regulatory Flexibility Act

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Pursuant to that review, it has been determined that this rule will not have a significant impact on a substantial number of small entities.

While there may be some SFA burden associated with initial certification for the performance-based reimbursement in this rule, the burdens will not be significant and will be outweighed by the benefits of increased Federal reimbursement for school lunches.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The National School Lunch Program and School Breakfast Program are listed in the Catalog of Federal Domestic Assistance under No. 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related notice (48 FR 29115, June 24, 1983), this program is

included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials. In developing this regulation, FNS gathered input from State and local program operators, and other stakeholders, via listening sessions held at the School Nutrition Association Legislative Action Conference in March 2011, and at the School Nutrition Association Annual National Conference in July 2011.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation with State Officials:

Prior to drafting this interim rule, FNS staff received informal input from various stakeholders while participating in various State, regional, national, and professional conferences. The School Nutrition Association, the Center for Science in the Public Interest, and the American Dietetic Association shared their views about performance-based reimbursement. Numerous stakeholders, including State and local program operators, also provided input at public meetings held by the School Nutrition Association.

Nature of Concerns and the Need to Issue this Rule:

State Agencies and SFAs want to provide the best possible school meals through the NSLP and SBP but are concerned about the costs and administrative burden associated with increased program oversight. While FNS is aware of these concerns, the National School Lunch Act, 42

U.S.C. 1753(b)(a)(4) requires that State agencies certify whether SFAs are in compliance with meal pattern and nutrition standards, and disburse performance-based reimbursement to eligible SFAs.

Extent to Which We Meet those Concerns:

FNS has considered the impact of this interim rule on State and local program operators and has attempted to develop a rule that would implement the performance-based reimbursement in the most effective and least burdensome manner. FNS recognizes that implementing the new performance-based reimbursement certification process will require a significant effort on the part of State and local program operators. To ensure State agencies conduct performance-based funding requirements and provide SFAs with the training and technical assistance needed to implement the improved school meal patterns, FNS has reduced the administrative review requirements for School Year 2012-2013. Per the requirements of the HHFKA, FNS will provide \$47 million to States for each of two years to assist with meal pattern implementation, training, technical assistance, and performance-based certification activities. FNS is also exploring additional approaches to alleviate program operators' administrative burden, including support for implementation and certification activities.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless specified in the DATES section of the final

rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300-4, "Civil Rights Impact Analysis", and 1512-1, "Regulatory Decision Making Requirements." After a careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability nor is it intended to have a differential impact on minority owned or operated business establishments, and woman-owned or operated business establishments that participate in the Child Nutrition Programs.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This is a new collection. The new provisions in this rule, which increase burden hours, affect the information collection requirements that will be merged into the National School Lunch Program, OMB Control Number #0584-0006, expiration date 5/31/2012. The current collection burden inventory for the National School Lunch Program is **12,654,440**. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When

the information collection requirements have been approved, FNS will publish a separate action in the Federal Register announcing OMB's approval.

Comments on the information collection in this interim rule must be received by [insert 60 days from date of publication in the Federal Register].

Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Lynn Rodgers-Kuperman, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection requirements, please contact Lynn Rodgers-Kuperman at the address indicated above. Comments are invited on: (1) Whether the interim collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the interim information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: Certification of Compliance with Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010

OMB Number: 0584-NEW

Expiration Date: Not Yet Determined

Type of Request: New Collection

Abstract: This rule amends National School Lunch Program regulations to conform to requirements contained in the Healthy, Hunger-Free Kids Act of 2010 (P.L. 111-296) regarding performance-based reimbursement for SFAs certified compliant with meal patterns and nutrition standards. This rule requires State agencies to certify whether participating SFAs are in compliance with meal requirements and, therefore, eligible to receive performance-based reimbursement for each reimbursable lunch served (an additional six cents per lunch available beginning October 1, 2012, adjusted annually thereafter). This rule also requires States to disburse performance-based cash assistance to certified SFAs, and withhold the performance-based reimbursement if an SFA is found to be out of compliance with meal pattern or nutrition standards during a subsequent administrative review. The intended effect of this rule is to incentivize SFAs to implement new meal pattern requirements to increase the healthfulness of meals served to school children.

Those respondents participating in the School Breakfast Program also participate in the National School Lunch Program, thus the burden associated with the School Breakfast Program will be carried in the National School Lunch Program. The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Respondents for this Interim Rule: State administering agencies (56) and School Food Authorities (20,858)

Estimated Number of Respondents for this Interim Rule: 20,914

Estimated Number of Responses per Respondent for this Interim Rule: 4.9960

Estimated Total Annual Responses: 104,488

Estimated Time per Respondent: 1.4988

Estimated Total Annual Reporting and Recordkeeping Burden on Respondents for this Interim

Rule: 156,608

ESTIMATED ANNUAL BURDEN FOR 0584-NEW, 6 Cents Rule, 7 CFR 210

Reporting						
	Section	Estimated Number of Respondents	Frequency of Response	Average Annual Responses	Average Burden per response	Annual Burden Hours
SAs review submitted certification materials and notify SFAs of the certification determination.	210.7(d)(1)(iv)	56	372	20,832	2	41,664
SAs submit a quarterly report to FNS detailing the disbursement of performance-based reimbursement to SFAs.	210.5(d)(2)(ii)	56	4	224	1.0	224
Total SA Reporting		56	376	21,056	1.9894	41,888
SFAs must submit certification materials to State agency to support receipt of performance based reimbursement.	210.7(d)(2)	20,858	1	20,858	4.5	93,861
SFAs must submit an annual attestation of compliance with meal pattern	210.7(d)(2)	20,858	1	20,858	0.25	5,215

requirements as new requirements are phased in.						
Total SFA Reporting		20,858	1	20,858	4.75	99,076
Total Reporting for 6 cents Interim rule		20,914	2.0041	41,914	3.3631603	140,964
Total Existing Reporting Burden for Part 210						2,912,745
Total Reporting Burden for Part 210 with 6 cents interim rule						3,053,709

Recordkeeping						
	Section	Estimated Number of Respondents	Frequency of Response	Average Annual Responses	Average Burden per Response	Annual Burden Hours
SFAs maintain documentation to support performance-based reimbursement.	210.7(d)(2)	20,858	2	41,716	0.25	10,429
SFAs maintain documentation related to the attestation of compliance submitted to the SA as an attachment to the written agreement required in 210.9(b).	210.7(d)(2)	20,858	1	20,858	0.25	5,215
Total Recordkeeping for 6 cents interim rule		20,858	3.0	62,574	0.25	15,644
Total Existing Recordkeeping Burden for 0584-0006, Part 210						8,893,821
Total Recordkeeping Burden for 0584-0006, Part 210 with 6 cents interim rule						8,909,465

SUMMARY OF BURDEN (OMB #0584-NEW)	
TOTAL NO. RESPONDENTS	20,914
AVERAGE NO. RESPONSES PER RESPONDENT	4.99608
TOTAL ANNUAL RESPONSES	104,488
AVERAGE HOURS PER RESPONSE	1.49880

TOTAL BURDEN HOURS FOR PART 210 WITH INTERIM RULE	11,963,174
CURRENT OMB INVENTORY FOR PART 210	11,806,566
DIFFERENCE (NEW BURDEN REQUESTED WITH INTERIM RULE)	156,608

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 13175- Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, or distribution of power and responsibilities between the Federal government and Indian tribes. In spring 2011, FNS offered opportunities for consultation with Tribal officials or their designees to discuss the impact of the Healthy Hunger Free Kids Act of 2010 on Tribes or Indian Tribal governments. The consultation sessions were coordinated by FNS and held on the following dates and locations:

1. HHFKA Webinar & Conference Call - April 12, 2011
2. Mountain Plains – HHFKA Consultation, Rapid City, SD – March 23, 2011

3. HHFKA Webinar & Conference Call - June, 22, 2011
4. Tribal Self-Governance Annual Conference in Palm Springs, CA – May 2, 2011
5. National Congress of American Indians Mid-Year Conference, Milwaukee, WI – June 14, 2011

There were no comments about this regulation received during any of the aforementioned Tribal Consultation sessions.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly scheduled quarterly consultation sessions through the end of FY2012 as a venue for collaborative conversations with Tribal officials or their designees.

List of Subjects in 7 CFR Part 210

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Penalties; Reporting and recordkeeping requirements; School breakfast and lunch programs; Surplus agricultural commodities.

Accordingly, 7 CFR part 210 is amended as follows:

PART 210 – NATIONAL SCHOOL LUNCH PROGRAM

1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751-1760, 1779.

2. Amend §210.4 by revising paragraph (b)(1) to read as follows:

§210.4 Cash and donated food assistance to States.

* * * * *

(b) * * *

(1) Cash assistance will be made available to each State agency administering the National School Lunch Program as follows:

(i) General: Cash assistance payments are composed of a general cash assistance payment and a performance-based cash assistance payment, authorized under section 4 of the Act, and a special cash assistance payment, authorized under section 11 of the Act. General cash assistance is provided to each State agency for all lunches served to children in accordance with the provisions of the National School Lunch Program. Performance-based cash assistance is provided to each State agency for lunches served in accordance with §210.7(d). Special cash assistance is provided to each State agency for lunches served under the National School Lunch Program to children determined eligible for free or reduced price lunches in accordance with part 245 of this chapter.

(ii) Cash assistance for lunches. The total general cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with §210.5(d)(3) or the total calculated by multiplying the number of lunches reported in accordance with §210.5(d)(1) for each month of service during the fiscal year, by the applicable national average payment rate prescribed by FNS. The total performance-based cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with §210.5(d)(3) or the

total calculated by multiplying the number of lunches reported in accordance with §210.5(d)(1) for each month of service during the fiscal year, by 6 cents for school year 2012-2013, adjusted annually thereafter as specified in paragraph (b)(1)(iii) of this section. The total special assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with §210.5(d)(3) or the total calculated by multiplying the number of free and reduced price lunches reported in accordance with §210.5(d)(1) for each month of service during the fiscal year by the applicable national average payment rate prescribed by FNS.

(iii) Annual adjustments. In accordance with section 11 of the Act, FNS will prescribe annual adjustments to the per meal national average payment rate (general cash assistance), the performance-based cash assistance rate (performance-based cash assistance), and the special assistance national average payment rates (special cash assistance) which are effective on July 1 of each year. These adjustments, which reflect changes in the food away from home series of the Consumer Price Index for all Urban Consumers, are annually announced by Notice in July of each year in the Federal Register.

(iv) Maximum per meal rates. FNS will also establish maximum per meal rates of reimbursement within which a State may vary reimbursement rates to school food authorities. These maximum rates of reimbursement are established at the same time and announced in the same Notice as the national average payment rates.

* * * * *

3. Amend §210.5 by revising paragraph (d)(2) to read as follows:

§210.5 Payment process to States.

* * * * *

(d) * * *

(2) Quarterly report. Each State agency administering the National School Lunch Program shall submit quarterly reports to FNS as follows:

(i) Each State agency shall submit to FNS a quarterly Financial Status Report (FNS-777) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(ii) Each State agency shall also submit a quarterly report, as specified by FNS, detailing the disbursement of performance-based cash assistance described in §210.4(b)(1). Such report shall be submitted no later than 30 days after the end of each fiscal year quarter. The report shall include the total number of school food authorities in the State, the names and locations of certified school food authorities, and for each school food authority, the total number of lunches earning the performance-based cash assistance for each month.

* * * * *

4. Amend §210.7 by redesignating paragraph (d) as paragraph (e) and adding a new paragraph (d) to read as follows:

§210.7 Reimbursement for school food authorities.

* * * * *

(d) Performance-based cash assistance. The State agency must provide performance-based cash assistance as authorized under §210.4(b)(1) for lunches served in school food authorities certified by the State agency to be in compliance with meal pattern and nutrition requirements set forth in §210.10 and, if the school food authority participates in the School Breakfast Program (7 CFR 220), §220.8 or §220.23, as applicable.

(1) State agency requirements. State agencies must establish procedures to certify school food authorities for performance-based cash assistance in accordance with guidance established by FNS. Such procedures must ensure State agencies:

(i) Make certification procedures readily available to school food authorities and provide guidance necessary to facilitate the certification process.

(ii) Require school food authorities to submit documentation to demonstrate compliance with meal pattern requirements set forth in §210.10 and §220.8 or §220.23, as applicable. Such documentation must reflect meal service at or about the time of certification.

(iii) Certification procedures must ensure that no performance-based cash assistance is provided to school food authorities for meals served prior to October 1, 2012.

(iv) Within 60 calendar days of a certification submission or as otherwise authorized by FNS, review submitted materials and notify school food authorities of the certification determination, the date that performance-based cash assistance is effective, and consequences for non-compliance;

(v) Disburse performance-based cash assistance for all lunches served beginning with the start of certification provided that documentation reflects meal service in the calendar month the certification materials are submitted or, in the month preceding the calendar month of submission. ; and

(vi) For school year 2012-2013, State agencies must conduct on-site validation reviews for a sample of certified school food authorities. State agencies must:

(A) Ensure that all certified school food authorities are subject to review and randomly select at least 25 percent of certified school food authorities for an on-site validation review; except that,

all large school food authorities, as defined in §210.18(b)(6) must be included in the sample selected; and

(B) Conduct validation reviews that include, at a minimum, observation of a meal service for each type of certified menu, review of production records for observed meals to ensure they are consistent with the menus on which certification was based, and a review of documentation submitted for certification to ensure that ongoing meal operations are consistent with certification documentation.

(vii) In years subsequent to the year certified, through School Year 2014-2015, State agencies must require school food authorities to submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in. The attestation must be provided to the State agency as an addendum to the written agreement required in §210.9(b).

(2) School food authority requirements. School food authorities seeking to obtain performance-based cash assistance must submit certification documentation to the State agency in accordance with State agency certification procedures, including documentation to support receipt of performance-based cash assistance. School food authorities must attest that the documentation provided is representative of the ongoing meal service within the school food authority. Required documentation includes a nutrient analysis and a detailed menu work sheet with food items and quantities or, a simplified nutrient assessment as well as a detailed menu worksheet with food items and quantities, and/or other materials specified in guidance issued by FNS. In years subsequent to the year of certification, through School Year 2014-2015, school food authorities must submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in. The attestation must be provided to the State agency as an

addendum to the written agreement required in §210.9(b). School food authorities certified to earn performance-based cash assistance must maintain documentation of compliance, including production and menu records, and other records, as specified by FNS. School food authorities must make appropriate records available to State agencies upon request.

* * * * *

5. Amend §210.15 by revising paragraph (b)(2) to read as follows:

§210.15 Reporting and recordkeeping.

* * * * *

(b) * * *

(2) Production and menu records as required under §210.10 and documentation to support performance-based cash assistance, as required under §210.7(d)(2).

* * * * *

6. Amend §210.18 by:

- a. Revising paragraph (a);
- b. Revising paragraph (d)(3);
- c. Adding paragraph (e)(4);
- d. Adding paragraph (g)(2)(v);
- e. Revising paragraph (m)(2) introductory text; and
- f. Adding paragraph (m)(2)(iv).

The revisions and additions read as follows:

§210.18 Administrative reviews.

(a) Implementation dates. Each State agency must follow the requirements of this section to conduct administrative reviews of school food authorities serving meals under parts 210 and 220

of this chapter. For school food authorities selected for administrative review in school year 2012-2013, State agencies may conduct the administrative reviews in school year 2012-13 or 2013-14; except that, State agencies must conduct reviews of those school food authorities identified as at-risk school food authorities in school year 2012-2013.

* * * * *

(d) * * *

(3) Exceptions. (i) In any school year in which FNS or OIG conducts a review or investigation of a school food authority in accordance with §210.19(a)(5) of this part, the State agency shall, unless otherwise authorized by FNS, delay conduct of a scheduled administrative review until the following school year. The State agency shall document any exception authorized under this paragraph.

(ii) Any school food authority that was not reviewed in the review cycle for school year 2007-2008 through school year 2012-2013, shall be reviewed in the first year of the 3-year review cycle set forth in paragraph (c) of this section (school year 2013-2014).

(e) * * *

(4) Noncompliance with meal pattern requirements. If the State agency determines there is significant noncompliance with the meal pattern and nutrition requirements as set forth in §210.10 and §220.8 and §220.23, as applicable, the State agency must select the school food authority for administrative review earlier in the review cycle.

* * * * *

(g) * * *

(2) * * *

(v) If the school food authority is receiving performance-based cash assistance under §210.7(d), assess the school food authority's meal service and documentation of lunches served and determine whether performance-based cash assistance should continue to be provided.

* * * * *

(m) * * *

(2) Performance Standard 2 violations. Except as noted under paragraph (m)(2)(iv) of this section, a State agency is required to take fiscal action for violations of Performance Standard 2 as follows:

* * * * *

(iv) Performance-based cash assistance. In addition to fiscal action described in paragraphs (m)(2)(i) through (iii) of this section, school food authorities may not earn performance-based cash assistance authorized under §210.4(b)(1) unless immediate corrective action occurs. School food authorities will not be eligible for the 6 cents per lunch reimbursement, as adjusted, with the beginning of the month following the administrative review and, at State discretion, for the month of review. Performance-based cash assistance may resume beginning in the first full month the school food authority demonstrates to the satisfaction of the State agency that corrective action has taken place.

* * * * *

7. Amend §210.19 by revising the second sentence of paragraph (c)(1) as follows:

* * * * *

(c) * * *

(1) * * * Fiscal action also includes disallowance of funds for failure to take corrective action to meet the meal requirements in parts 210 and 220 of this chapter, including the disallowance of performance-based cash assistance described in §210.4(b)(1). * * *

* * * * *

Kevin Concannon
Under Secretary
Food, Nutrition and Consumer Services

April 20, 2012
Date

[FR Doc. 2012-10229 Filed 04/26/2012 at 8:45 am; Publication Date: 04/27/2012]